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Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 6

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
Petitioner,

v.

JAMES FRASIA MAY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT Y. BUTTON
Attorney General of Virginia

RENO S. HARP, III
Assistant Attorney General of Virginia

Supreme Court Building
Richmond, Virginia 23219

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Supreme Court of the United States

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C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

JAMES FRASIA MAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

C. C. Peyton, Superintendent of the Virginia State Penitentiary prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on June 26, 1968, in the case of James Frasia May v. C. C. Peyton, Superintendent of the Virginia State Penitentiary. The mandate was stayed for forty-five days on July 10, 1968, and pursuant to motion of counsel, a further stay was granted on July 22, 1968.

OPINIONS BELOW

The memorandum order and opinion of the Supreme Court of Appeals of Virginia in the case of Commonwealth

of Virginia v. James F. May denying the petition for a writ of error and supersedeas decided on April 27, 1966, is not reported, but the same will be found in Appendix I of this brief.

The opinion of the Judge of the United States District Court for the Western District of Virginia of April 24, 1967, is found in Appendix II, and a further opinion of the same Judge of May 9, 1967, is found in Appendix III.

The opinion of the court below has not yet been reported but will be found in Appendix III.

THE JUDGMENT

The judgment was entered on June 26, 1968.

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in this case is grounded upon 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

I.

Did The United States Court of Appeals for the Fourth Circuit Err in Holding That the Prisoner Had Exhausted his State Remedies?

II.

Did The United States Court of Appeals for the Fourth Circuit Err in Holding That the Imposition of an Increased Sentence Upon Conviction of a State Prisoner in a Retrial is Unconstitutional?

STATUTES INVOLVED

§ *2254. State custody; remedies in Federal courts*

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in

support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding. (28 U.S.C., Section 2254, as amended)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be

sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928." (28 U.S.C., Section 1254)

§ *53-272. Suspending sentence and placing on probation.*—After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at the bar is charged, if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest, the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence or commitment, and may also place the defendant on probation under the supervision of a probation officer, during good behavior for such time and under such conditions of probation as the court shall determine. In case the prisoner has been sentenced for a misdemeanor and committed, or in case a jail sentence has been imposed upon the prisoner upon conviction of a felony, the court, or judge of such court in vacation may at any time before the sentence has been completely served, suspend the unserved portion of any such sentence.

In case the prisoner has been sentenced but not actually committed and delivered to the penitentiary for a felony the court which heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may place the defendant on probation under the supervision of the probation officer during good behavior, for such time and under such conditions of probation as the court shall determine.

In any case wherein a court is authorized to suspend the imposition or execution of sentence, such court may fix the period of suspension for a reasonable time, having due regard to the gravity of the offense, without regard to the maximum period for which the prisoner might have been sentenced.

In case the prisoner has been sentenced and committed to the penitentiary for a felony and the sentence is partially suspended, for purposes of good behavior

credit and for parole eligibility, the term of imprisonment shall be that portion of the sentence which was not suspended. (Code of Virginia)

§ *19.1-291. Ascertainment of punishment in criminal cases generally when tried by jury.*—The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law. (Code of Virginia)

§ *19.1-249. Accused guilty of part of offense charged, sentence; on new trial what tried.*—If a person indicted of a felony be by the jury acquitted of part of the offense charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor. If the verdict be set aside and a new trial granted the accused, he shall not be tried for any higher offense than that of which he was convicted on the last trial. (Code of Virginia)

STATEMENT OF CASE

On January 13, 1958, a warrant was issued charging the prisoner with robbery. On January 21, 1958, the prisoner had a preliminary hearing before the County Court of Albemarle County, and this case was certified to the Grand Jury. He was indicted at the February, 1958 Term. On February 6, 1958, he entered a plea of not guilty, was tried by the Court without a jury and sentenced to serve a term of ten years in the Virginia State Penitentiary.

On April 13, 1965, a hearing was held in the Circuit Court of Albemarle County, Virginia, in connection with the prisoner's application for a writ of habeas corpus. The Court, after hearing the evidence, entered an order on April 19, 1965, issuing the writ on the ground that the prisoner was not effectively represented by counsel.

The prisoner was tried on June 11, 1965, by a jury in the

Circuit Court of Albemarle County, Virginia, and sentenced to serve twenty years in the Penitentiary, having been convicted of robbery.

On April 27, 1966, the Supreme Court of Appeals of Virginia denied a petition for a writ of error to the aforesaid judgment. On October 10, 1966, the Supreme Court of the United States denied a petition for a writ of certiorari. (*May* v. *Virginia,* 385 U.S. 872 (1966).)

On November 29, 1966, the petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Virginia at Charlottesville. Subsequently, an answer was filed, the State Court records were furnished, and the petition was dismissed for the reasons stated in the District Court's opinions.

Upon dismissal of the petition for a writ of habeas corpus filed in the District Court, a certificate of probable cause was granted, and an appeal was perfected to the court below, which by its opinion of June 26, 1968, reversed the District Court's decision.

ARGUMENT

The Superintendent will show first that the court below has ignored the rule of exhaustion established by its own decisions in ruling in the premises. The Superintendent will also show that the decision of the court below, holding that a prisoner cannot receive a greater sentence on retrial after the issuance of a writ of habeas corpus, is not even raised by the pleadings. Moreover, the Superintendent will demonstrate that the court below has ignored this Court's decision in *Robinson* v. *United States,* 324 U.S. 282; rehearing denied, 324 U.S. 889; second rehearing denied, 325 U.S. 895 (1945).

I.

The Court Erred in Holding That the Prisoner Therein Had Exhausted His State Remedies

It is well settled that Federal law requires that a state prisoner exhaust his state remedies before the Federal courts can assume jurisdiction in a habeas corpus proceeding. (28 U.S.C. § 2254, et seq.) This rule is deemed to have been complied with under certain circumstances. See *Fay* v. *Noia,* 372 U.S. 391 (1963). However, a review of the record reveals that such circumstances do not obtain in this case.

The prisoner in this case commenced the service of the sentence of which he complains on January 17, 1968. This was prior to the order of the lower court of March 5, 1968, granting the certificate of probable cause and appointing counsel to represent him. It is clear, therefore, that the prisoner can raise this question in the courts of the Commonwealth of Virginia. The Circuit Court of Albemarle County, Virginia, is the proper forum to consider this case in the first instance. (*Wade* v. *Peyton,* 378 F.2d 50 (1967); *Thomas* v. *Virginia,* 357 F.2d 87 (1966).)

Counsel for the prisoner in the court below sought to overcome the exhaustion principle by saying that the Supreme Court of Appeals of Virginia had already dealt with the question of the imposition of an increased sentence on retrial in the direct appeal. He says that the assignment of error in that proceeding, wherein the prisoner states *that the Judge of the Circuit Court of Albemarle County, Virginia, abused his discretion by failing to suspend any or all of the sentence imposed by the jury, should be interpreted as an attack on the validity of the sentence itself.* Manifestly, such an interpretation requires certain mental gymnastics which change the entire complaint as originally set forth.

Virginia law provides that the jury shall fix the punishment of the defendant. (§ 19.1-291, Code of Virginia, 1950, as amended.) After the imposition of the sentence, the judge, in his discretion, may suspend any or all of the sentence. (§ 53-272, Code of Virginia.) It is clear, therefore, that the judge's discretionary power to suspend and the validity of the sentence imposed are separate and distinct questions.

It is, therefore, quite clear that the prisoner's assignment of error in the Supreme Court of Appeals of Virginia did not raise the question which was decided by the court below. Moreover, it is equally manifest that the decision in the premises does violence to Virginia law and, in effect, changes the statutory law of the Commonwealth. The failure of the Fourth Circuit Court of Appeals to permit a determination by the Supreme Court of Appeals of Virginia of the question raises many problems in connection with the applicable Virginia law.

The decision of the court below gives no hint as to how this matter should be handled at the time of a prisoner's trial. Should the jury be instructed that it can only impose a sentence equal to that imposed at the previous trial? This certainly puts the jury on notice that the man has previously been convicted and that this is a retrial for some purpose. This certainly would be to the prisoner's detriment. This is but one example of the problems presented by the decision and emphasizes the need for exhaustion by the prisoner.

II.

The United States Court of Appeals for the Fourth Circuit Erred in Holding That the Imposition of an Increased Sentence Upon Conviction of a State Prisoner in a Retrial Is Unconstitutional.

As hereinbefore pointed out, this question has not been presented to the appropriate Virginia courts. Moreover, the

question is not even raised by the pleadings. (*Burgess* v. *Warden,* 284 F.2d 486 (1960).) Since the question is not even raised by the pleadings, it is manifest that it should not have been considered by the court below.

For the Court's information, the prisoner was released on his own recognizance by the order of the Chief Judge of the United States Court of Appeals for the Fourth Circuit with the full consent of the Superintendent. This was done in order that there would be adequate time for this Court to review this case.

The prisoner relies principally upon the decision of the United States Court of Appeals for the Fourth Circuit in *Patton* v. *North Carolina,* 381 F.2d 636 (1967). In the first place, unlike *Patton,* the prisoner received credit for the time served on his void sentence in accordance with the decision of the Supreme Court of Appeals of Virginia in *Stonebreaker* v. *Smyth,* 187 Va. 250, 46 S.E. 2d 406 (1948). Moreover, in this case at bar, the prisoner was tried by a jury. In Virginia, of course, the jury fixes the punishment to be imposed (§ 19.1-291, Code of Virginia). No one has suggested that § 19.1-249 of the Code, which provides that if on direct appeal the judgment is set aside, the accused cannot be convicted of a higher crime to mean that an increased sentence cannot be imposed. The Seventh Circuit Court of Appeals in *United States* v. *Russell,* 378 F.2d 808 (1967); and *United States* v. *White,* 382 F.2d 445 (1967), held that a greater sentence can be imposed upon retrial. (See also, *Marano* v. *United States,* 374 F.2d 583 (1967).)

The prisoner suggests in effect that this Court should judicially amend Virginia law and require that at the time of the retrial the instructions given the jury as to the amount of punishment to be imposed must contain language limiting the sentence to that previously imposed. This suggestion is clearly without merit and unsupported in law. Moreover.

it is clear that the court below refused to follow the decision of the Court in *Robinson* v. *United States, supra.* In *Robinson,* the petitioner was serving a life sentence for kidnapping and had the same set aside because he did not intelligently waive counsel. At his second trial, he was sentenced to death. This Court upheld this conviction, and it is submitted that *Robinson* is controlling herein, *if this matter is to be considered on the merits.*

The court below, in effect, by its opinion has judicially amended the Virginia law by requiring that at the time of the retrial, the instructions given the jury as to the amount of punishment to be imposed must contain language limiting the sentence to that previously imposed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted, and the judgment in this case reversed.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

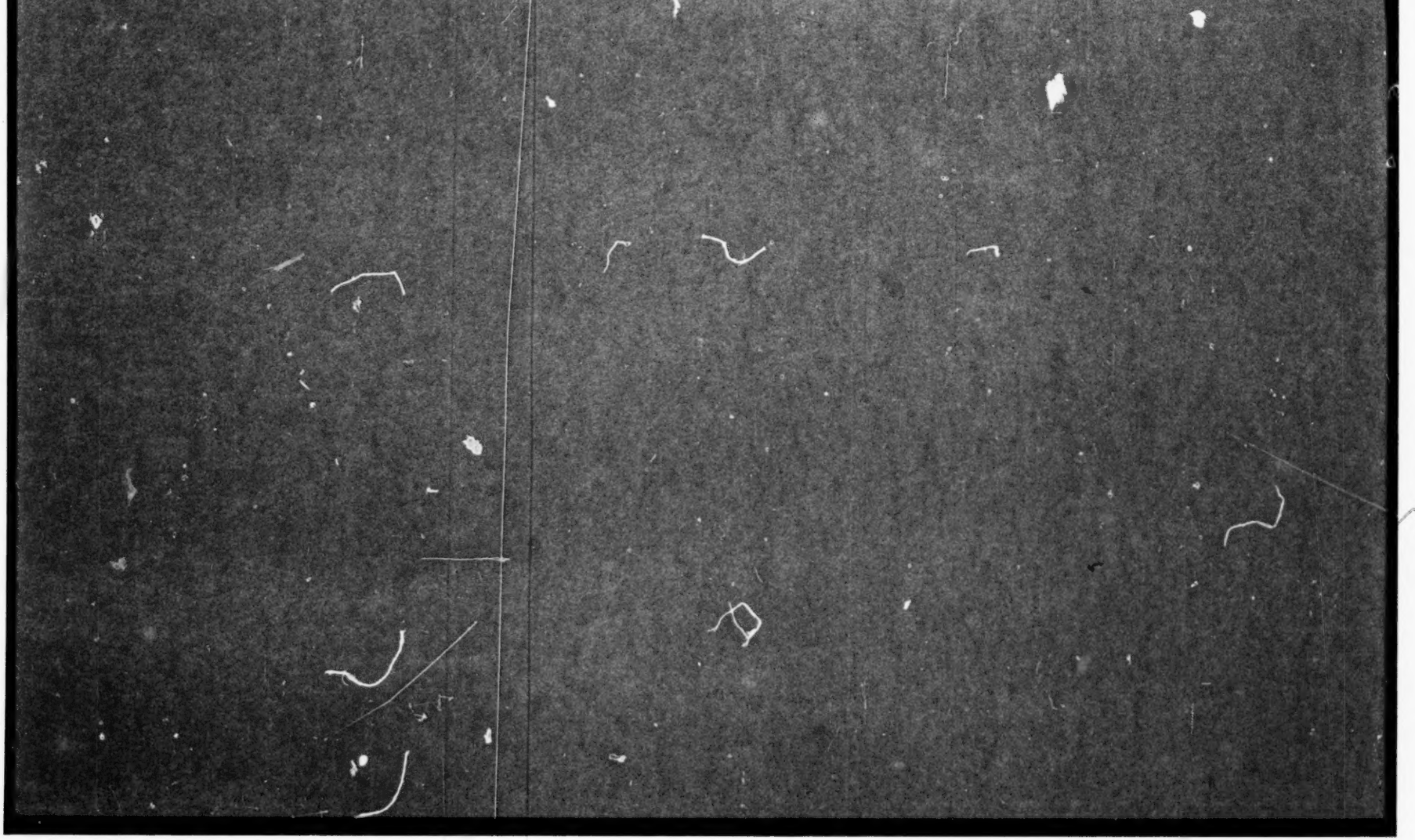
RENO S. HARP, III
Assistant Attorney General of Virginia

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Reno S. Harp, III, an Assistant Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the bar of the Supreme Court of the United States, do hereby certify that on this 23rd day of September, 1968, I mailed a copy of the foregoing Petition for a Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to Robert L. Dolbeare, Esquire, Attorney at Law, P.O. Box 1535, Richmond, Virginia 23212, counsel for the respondent herein.

RENO S. HARP, III
Assistant Attorney General



APPENDIX I

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday *the* 27th *day of* April, 1966.

The petition of James F. May for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Albemarle County on the 11th day of June, 1965, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court, which court shall allow court-appointed counsel the sum of $125, for services rendered on this appeal, his costs and necessary expenses.

And it is ordered that the Commonwealth recover of the plaintiff in error the said amount paid counsel appointed to represent him in this court, his costs and necessary expenses, the costs to be taxed by the clerk of this court, the amount paid counsel appointed by the said circuit court to represent the said James F. May therein, his costs and necessary expenses, and the costs to be assessed in this case by the clerk of the said circuit court.

A Copy,
Teste:

Clerk's fee in Supreme Court of Appeals $1.50

/s/ H. G. Turner
Clerk

Teste:
/s/ H. G. Turner
Clerk

APPENDIX II

Memorandum Order

Following entry of a plea of not guilty and a trial by jury in the Circuit Court of Albemarle County in June of 1965, the above-named prisoner was convicted and sentenced to twenty years imprisonment for armed robbery. An earlier conviction arising out of the same circumstances had been set aside and the sentence declared null and void.

Though he is not now serving the twenty year sentence resulting from his 1965 armed robbery conviction, his attack on that conviction is not considered premature. Since his armed robbery sentence affects his present eligibility for parole, the Fourth Circuit considers May to be "in custody" within the meaning of 28 U.S.C. § 2241. The armed robbery sentence under these circumstances, if invalid, is a wrongful restraint of his liberty. *Martin* v. *Commonwealth of Virginia,* 349 F.2d 781 (4th Cir. 1965). See also, *Williams* v. *Peyton,* 372 F.2d 216 (4th Cir. 1967).

Proceeding under the assumption that a scatter gun is more likely to hit something than a rifle petitioner has not bothered to restrict the number of allegations fired at the Court whether they be of merit or not. Typical of the frivolous contentions advanced by May is his initial one. He claims that his armed robbery conviction should fall because he was denied a preliminary hearing. A second preliminary hearing was not given petitioner in 1965 as he was already indicted pursuant to the 1958 preliminary hearing concerning the same charges. Judge Sobeloff's words in regard to another case apply equally as well to the present litigation:

> The further claim of the appellant that he was denied his constitutional rights because no preliminary hearing

> was held in his case is without merit. . . . The Virginia Statute does not require a preliminary hearing after indictment. *Webb* v. *Commonwealth*, 204 Va. 24, 129 S.E.2d 22 (1963), interpreting section 19.1-163.1 of the Code of Virginia (Repl. Vol.). Nor does it appear that the appellant was in any way prejudiced by the omission of a preliminary hearing.

Braxton v. *Peyton*, 365 F.2d 563, 565 (4th Cir. 1966).

Petitioner alleges that his 1965 conviction is contrary to the law and evidence. He also complains of the trial judge's failure to exclude hearsay evidence. Ordinarily, neither contention is a proper basis for habeas corpus relief. These allegations should be made and examined on direct appeal and unless a conviction is so totally devoid of evidentiary support as to be a violation of due process, should not be considered in a collateral attack. See e.g., *Hamilton* v. *North Carolina*, 260 F.Supp. 632, 634 (D.C.N.C. 1966). Having examined the transcript of the trial proceedings which I hereby designate as part of the official record, I certainly cannot say the conviction is so devoid of evidentiary support as to be a violation of due process. Petitioner also claims that he was not allowed to make a plea of his own choosing. According to him, the trial court forced him to make a plea identical to the one made in his 1958 trial. Even if this were true, since the plea in both instances was "not guilty", the petitioner was not prejudiced.

May's next contention is that the prosecutor refused to let him waive a trial by jury. Apparently, such a denial is supposed to be tantamount to a denial of a constitutional right. But existence of an absolute right to a trial by jury in a criminal case does not *a fortiori* lead to the conclusion that one has a right of similar import to forgo a trial by

jury. In fact, the Supreme Court made it clear in *Singer* v. *United States*, 380 U.S. 24 (1965) that an accused has no absolute right to choose between alternate methods of trial. In that case Singer challenged the constitutionality of Rule 23(a) of the Federal Rules of Criminal Procedure which requires the government's consent before a suspect is allowed waiver of trial by jury. After tracing the origin of trial by jury from the older procedures of compurgation, ordeal, and battles though its development under the English Common Law, then under the Colonial Experience, to our present procedures under the Constitution, the Court said page 36:

> In light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him.

It is axiomatic that if a federal prisoner has no absolute right to waiver a jury trial, a state prisoner is in no better position assuming state law also makes waiver contingent on approval by the prosecutor. Virginia law provides for just such a contingency. Virginia Constituiton § 8, § 19.1-192 of the Code of Virginia. See *Boaze* v. *Commonwealth*, 165 Va. 786, 183 S.E. 263 (1936).

Petitioner has failed to exhaust his state remedies concerning allegations made in his supplemental petition that

he has not been credited with time illegally served. In his "Reply", May fires one last shot. He claims that the respondent and the Circuit Court of Albemarle County have conspired to juggle sentence terms out of their proper sequence. This allegation need not be dignified by extensive discussion. Suffice it to say that this contention is meritless, frivolous and furthermore, cannot be considered by this Court until it has been presented to the state courts. May must exhaust his state remedies with respect to his allegation also.

Accordingly, it is

ORDERED

that the prisoner's petition for a writ of habeas corpus is denied and it is further

ORDERED

that the petitioner be and he hereby is granted leave to proceed on appeal in forma pauperis from this order.

It appearing to the court that the petitioner raises no substantial question, it is further

ORDERED

that, if the petitioner wishes to appeal, an application for a certificate of probable cause will be denied by this court.

If the petitioner wishes to appeal, he must file written notice of appeal with this court within thirty days from the entry of this order and, if he does file such notice, the Clerk of this court is directed to transmit the record on appeal to the United States Court of Appeals for the Fourth Circuit.

Let the Clerk send copies of this order to the petitioner and to the Attorney General of Virginia.

ENTER: April 24, 1967.

/s/ Thomas J. Michie
United States District Judge

A TRUE COPY, TESTE:
Leigh B. Hanes, Jr., Clerk
By: /s/ Virginia P. Harris
Deputy Clerk

Clerk's Office, U. S. District Court
FILED
April 24, 1967

LEIGH B. HANES, Jr. Clerk
By /s/ Virginia P. Harris
Deputy

custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to

APPENDIX III

Order

James Frasia May filed a petition for habeas corpus in this court late in the year of 1966. During a period of approximately four and one-half months various state records were requested and received, a response was filed, and petitioner filed a supplemental petition and later, a "Reply". When a decision unfavorable to the petitioner was rendered on April 24, 1967, he suddenly decided that his original pleadings were neither "complete nor explanatory of the facts relating to [the] issues." He filed a Motion to Reopen asking the court to set aside its judgment of April 24th explaining that the alleged incompleteness of his petition results from the fact that he "is a functional illiterate, untrained in the law, and must depend upon assistance from such sources as may be available in the prison in lieu of professional legal talent."

Petitioner abandons the issues previously raised concerning his right to a second preliminary hearing and inability to waive a jury trial. The contentions that he would have the court consider now do not furnish any proper ground for reopening the case. I do not find the fact that he was dressed in prison clothes at the time of his criminal trial to be so prejudicial as to rise to the level of a deprivation of due process. Furthermore, regardless of the prejudice involved, this allegation has not been exhausted in the state courts. Nor has he exhausted his state remedies in regard to the alleged defective indictment mentioned in paragraph five of the motion to reopen, And the prejudicial remarks supposedly made by the prosecuting attorney at the time of trial are not properly reviewable in a habeas corpus proceeding. The record shows petitioner's allegation that his counsel was ineffective to be without basis in fact.

Finally, petitioner has not exhausted his state remedies as required by 28 U.S.C. § 2254 with respect to his involuntary servitude argument and the alleged "juggling of sentences." It is well established that a state prisoner cannot escape the exhaustion requirement by claiming that his charge is cognizable under 42 U.S.C. § 1983 (deprivation of civil rights). *Johnson* v. *Walker,* 317 F.2d 418 (5th Cir. 1963); *Gaito* v. *Strauss,* 249 F. Supp. 923, 930 (D.C. Pa. 1966).

In accordance with the above, it is ORDERED that petitioner's motion to reopen his case is hereby denied.

It is further ORDERED that this court's original Memorandum Order shall be treated as having been entered on the same date as the present order is entered.

Let the Clerk send copies of this order to the petitioner and counsel for respondent.

ENTER: May 9, 1967.

/s/ Thomas J. Michie
United States District Judge

A TRUE COPY, TESTE:
Leigh B. Hanes, Jr., Clerk
By: /s/ Virginia P. Harris
Deputy Clerk

Clerk's Office, U. S. District Court
FILED
May 9, 1967

LEIGH B. HANES, Jr., Clerk
By /s/ Virginia P. Harris
Deputy

APPENDIX IV

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,428.

James Frasia May,
Appellant,

versus

C. C. Peyton, Superintendent of the
Virginia State Penitentiary,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT CHARLOTTESVILLE. THOMAS J. MICHIE, UNITED STATES DISTRICT JUDGE.

(Argued June 18, 1968. Decided June 26, 1968.)

Before HAYNSWORTH, Chief Judge, and BRYAN and WINTER, Circuit Judges.

Robert L. Dolbeare (Court-assigned counsel) [Hunton, Williams, Gay, Powell & Gibson on brief] for Appellant, and Reno S. Harp, III, Assistant Attorney General of Virginia, (Robert Y. Button, Attorney General of Virginia, on brief) for Appellee.

PER CURIAM:

Petitioner, who was denied habeas corpus relief by the district court, was convicted of robbery, on February 6, 1958, in the Circuit Court of Albemarle County, Virginia, which tried him without a jury. He was sentenced to ten years in the Virginia State Penitentiary. In 1965, petitioner's post-conviction attack on that judgment was successful and he was granted a new trial. Petitioner was retried in 1965, and again convicted—this time by a jury which sentenced him to twenty years in the Virginia State Penitentiary.

In oral argument, counsel for the Commonwealth admitted that petitioner had served an aggregate of at least ten years on the two convictions, but counsel contends that *Patton* v. *North Carolina,* 381 F.2d 636 (4 Cir. 1967), *cert. den.,* 390 U.S. 905 (1968), is inapplicable where, as here, petitioner's original sentence, subsequently determined to be void, was imposed by a judge, and petitioner's current sentence was imposed by a jury.

We perceive no distinction in the application of the doctrine announced in *Patton,* whether either or both sentences was imposed by the court or by a jury. Petitioner could not constitutionally be resentenced to a term in excess of that originally imposed with credit for the time served under the void sentence. *Whaley* v. *North Carolina,* 379 F. 2d 221 (4 Cir. 1967). Having served the term originally imposed as so computed, petitioner is entitled to his immediate release.

We reverse the judgment of the district court, and direct that the writ issue forthwith. Since counsel for the Commonwealth has not been afforded an opportunity to verify the accuracy of his admission, he may apply for a modification of this opinion and the judgment entered thereon

within five days after the same shall be announced should he determine that his statement to us was inaccurate; otherwise, the clerk shall issue the mandate after the expiration of five days.

Reversed.